ATTORNEY FOR APPELLANT:

LEANNA WEISSMANN
Lawrenceburg, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JASON GODDARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 69A05-0602-CR-61
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl Taul, Judge
Cause No. 69C01-0403-FC-011

October 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Jason Goddard appeals from his conviction for Child Molesting,[1] a class C felony, and the sentence imposed thereon. In particular, Goddard argues that the trial court erred in declining to respond to a question from the jury, in finding and weighing aggravators and mitigators, and in imposing a sentence that is inappropriate in light of the nature of the offense and Goddard's character. Additionally, Goddard argues that the trial court erred in imposing a condition of probation prohibiting him from having contact with anyone under the age of eighteen, including his infant son. Finding that any error in declining to respond to the jury's question was harmless and finding no other error, we affirm the judgment of the trial court.

FACTS

At some point between October 29, 2003, and January 1, 2004, Goddard was babysitting for his six-year-old niece, C.G., and removed her underwear and touched her genitalia. When questioned by the police, Goddard admitted to touching C.G.'s genitalia in a tape-recorded statement.

On March 11, 2004, the State charged Goddard with class C felony child molesting. A two-day jury trial commenced on November 29, 2005. During deliberations, the jury presented the trial court with a question, as described in the following conversation between the trial court and the attorneys regarding the proper way to respond, if at all, to the question:

> TRIAL COURT: The jury has tendered a question to the Court. ["]Does intention need to have any time period of premeditation?["] The Court has called the attorneys for both sides, present, into the courtroom and the defendant is also present. The alternate jurors are

[1] Ind. Code § 35-42-4-3(b).

> not in the courtroom. Um, the court intends, at least at this juncture, to read [to] the jury as a result of the question, uh since they did not receive it, an instruction defining intentionally. A person engages in conduct intentionally if when he engages in the conduct it is his conscious objective to do so. I am here to determine the wishes or objections of counsel to that proposed procedure. . . .
>
> DEFENSE COUNSEL: I agree with that procedure[.] I think that we need to give them the definition from the pattern with regard to intention.
>
> STATE: Judge, my only concern, as I stated prior to going on record, is uh, criminal intent [is] something different than intentionally as defined by the pattern instructions and I would hate to give them intentionally if it is something different. I, frankly, would like to see the Court, as this is an issue of law, answer the question for them[.] [A]s discussed in chambers[,] this is a point of law and intent can be formed whether it be one (1) second, five (5) seconds or an hour.
>
> TRIAL COURT: Faced with that alternative, the Court will not instruct the jury at all. Mr. Schmaltz, you will advise the jury that the Court cannot answer its question.

Tr. p. 745-46. The jury found Goddard guilty as charged. Subsequently, the jury found as an aggravating factor that Goddard was in a position of care, custody, and control of the victim. At a sentencing hearing held on January 4, 2006, the trial court found no additional aggravators and no mitigating circumstances, imposing a sentence of six years with two years suspended to probation. As a condition of probation, the trial court prohibited Goddard from having any direct or indirect contact with minors under the age of eighteen, making no exception for Goddard's infant son. Goddard now appeals.

DISCUSSION AND DECISION

I. Question From the Jury

Goddard first contends that the trial court should have responded to the jurors' question regarding the definition of "intent" by providing them with the pattern jury instruction defining "intentionally."[2] Specifically, he argues that because the jurors' question raised an issue of law—which the State concedes—the trial court was required by Indiana Code section 34-36-1-6 to answer their question.

Even if we assume for argument's sake that the trial court erred in declining to answer the jury's question, we note that an instructional error is harmless "where a conviction is clearly sustained by the evidence and the instruction would not likely have impacted the jury's verdict." Randolph v. State, 802 N.E.2d 1008, 1013 (Ind. Ct. App. 2004), trans. denied. We will reverse an instructional error only where we cannot say with complete confidence that a reasonable jury would have rendered a guilty verdict had the instruction—or, here, answer to the jury's question—been given. Id. Here, Goddard admitted to the police that he had touched C.G.'s genitalia and that he knew it was wrong when he did it. Coupled with the testimony of C.G. and her father, we are completely confident that even if the trial court had instructed the jury on the requested issue of law, a reasonable jury would have rendered a guilty verdict. Consequently, we conclude that any error committed by the trial court was harmless.

[2] Goddard does not argue that the trial court improperly instructed the jury to begin with by failing to give an instruction regarding intent. Indeed, he has waived any such argument because he failed to raise any such objection at trial. Lemos v. State, 746 N.E.2d 972, 974 (Ind. 2001).

II. Sentencing

A. Aggravators and Mitigators

Goddard next contends that the trial court erred in finding and weighing aggravating and mitigating circumstances.[3] Specifically, he argues that the trial court assigned too much aggravating weight to his prior criminal history and should have considered undue hardship to his son as a mitigating circumstance. As we consider these arguments, we observe that sentencing determinations are within the sound discretion of the trial court, and we will only reverse for an abuse of discretion. Krumm v. State, 793 N.E.2d 1170, 1186 (Ind. Ct. App. 2003). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

In a sentencing statement, a trial court must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at the sentence. Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006). A trial court is not obligated to weigh a mitigating factor as heavily as the defendant requests. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). A single aggravating factor may support the imposition of an enhanced sentence. Payton v. State, 818 N.E.2d 493, 496 (Ind. Ct. App. 2004), trans. denied.

Turning first to Goddard's criminal history, although he argues that the trial court assigned too much aggravating weight to this factor, it is apparent from the record that the

[3] On April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. Because the

trial court gave little or no aggravating weight to Goddard's criminal history. At the hearing, the trial court commented as follows: "There is minimal criminal history which certainly doesn't help his case any but then I don't think it particularly harms his case to any significant degree anyway." Tr. p. 770. The sentencing order does not list Goddard's criminal history as an aggravator. We cannot conclude, therefore, that the trial court weighed Goddard's criminal history too heavily as an aggravator.

Goddard goes one step further, contending that the trial court should have considered his lack of a prior criminal history to be a mitigating circumstance. Although Goddard's history includes no prior convictions, the record reveals a true finding of driving without a license as a juvenile; further, Goddard was facing charges of class D felony possession of a controlled substance and class B misdemeanor reckless possession of paraphernalia at the time of sentencing. Given his prior—and recent—contacts with the criminal justice system, we conclude that the trial court did not abuse its discretion in declining to consider Goddard's lack of prior convictions as a mitigating circumstance.

Goddard also argues that the trial court should have considered as a mitigating circumstance the undue hardship to his infant son as a result of his incarceration. But the trial court is not required to consider undue hardship to a defendant's dependents as a mitigating circumstance, especially when the defendant fails to establish that incarceration for a longer term will cause more hardship than incarceration for a shorter term. Weaver v.

---

instant offense occurred in 2003 or 2004, we will review Goddard's sentence under the former version of the relevant sentencing statute. See Ind. Code § 35-50-2-6.

State, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), trans. denied; see also Abel v. State, 773 N.E.2d 276, 280 (Ind. 2002). Here, Goddard offered no such evidence. Moreover, although incarceration of a parent undeniably causes hardship to his dependents, Goddard has not established that the hardship that will be suffered by his infant son will be undue. Thus, we cannot conclude that the trial court abused its broad discretion in declining to find this mitigating circumstance.

Goddard next argues that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character. See Ind. Appellate Rule 7(B). As to the nature of the offense, we observe that Goddard molested his six-year-old niece, violating her trust and that of his family unit as a whole. The ripple effects of his actions will likely be felt in his family for years to come. As to Goddard's character, we again observe that although he has amassed no prior convictions, he has had multiple contacts with the criminal justice system in recent years. Under these circumstances, we conclude that a six-year sentence with two years suspended to probation is not inappropriate.

III. Condition of Probation

Finally, Goddard contends that the trial court erred in prohibiting him from having direct or indirect contact with minors under the age of eighteen as a condition of probation. In particular, he argues that this prohibition interferes with his constitutionally-protected right to parent his son and that it is overbroad and vague. Initially, we note that Goddard failed to object to this condition of probation at the time it was imposed. Consequently, he has waived

this argument. Stott v. State, 822 N.E.2d 176, 179 (Ind. Ct. App. 2005), trans. denied. We also note that Goddard has not sought to modify the conditions of his probation.

Waiver notwithstanding, we observe that probation is a matter of grace and a conditional liberty that is a favor, not a right. Strowmatt v. State, 779 N.E.2d 971, 976 (Ind. Ct. App. 2002). A trial court has broad discretion to establish the conditions of probation, limited only by the requirement that the conditions have a reasonable relationship to assisting the probationer's rehabilitation and protecting the community. Fitzgerald v. State, 805 N.E.2d 857, 864 (Ind. Ct. App. 2004). Conditions of probation may impinge upon the exercise of what would otherwise be a constitutionally-protected right. Id. at 864-65.

In Stott, we considered a defendant who had been convicted of child molesting and was barred as a condition of probation from having any contact with children under the age of eighteen and from entering within 1000 feet of any school or daycare center. Stott had a twelve-year-old daughter with whom he spent time on the weekends. We observed that child molesters molest children to whom they have access, and, therefore, conditions of probation that reduce the potential for access to children are reasonable. 822 N.E.2d at 179-80. Finding that the condition was proper, we further noted that

> [i]nsofar as Stott's future relationship with his daughter is concerned it would seem appropriate, when the time is right, to petition the court for a modification of his probation to include visitation with that child. In that way the trial court could hear evidence that would enable a proper decision on the matter.

Id. at 180.

Here, the condition of probation at issue is a protective measure for children and one that will assist Goddard in his rehabilitation. Goddard was convicted for molesting a young

member of his family; consequently, we cannot say that the prohibition is overly broad insofar as it extends to his infant son. But as noted in Stott, Goddard is free to seek a modification of his probation with respect to his son, enabling the trial court to hear evidence on the matter. Similarly, to the extent that Goddard is concerned that the condition of probation is overly broad and may prevent him from grocery shopping and/or mailing child support checks to his son's mother, he should file a petition with the trial court to modify and clarify the conditions of his probation. We conclude that the trial court did not abuse its discretion in imposing this condition of probation.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.